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Nos. 92-484 and 92-507

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
PETITIONER

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA,
INC., ET AL.

STEPHEN R. STEINBRINK, ACTING COMPTROLLER
OF THE CURRENCY, ET AL., PETITIONERS

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA,
INC., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

American Hospital Ass'n v. *NLRB*, 111 S. Ct. 1539 (1991) 9
Conroy v. *Aniskoff*, No. 91-1353 (Mar. 31, 1993) 2
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 9
Field v. *Clark*, 143 U.S. 649 (1892) 1
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933) 11
Posadas v. *National City Bank*, 296 U.S. 497 (1936) 5
Schilling, In re, 53 F. 81 (2d Cir. 1892) 4
United States v. *American Trucking Ass'ns*, 310 U.S. 534 (1940) 11
United States v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976) 9

Statutes and regulations:

Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 ..... 2, 3, 4, 5, 7, 8, 11
§ 13, 38 Stat. 263 ..... 2, 4, 5, 7, 8, 11
§ 25, 38 Stat. 273 5
Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752 ..... 2, 3, 4, 5, 7, 10, 11, 12
War Finance Corporation Act of 1918, ch. 45, 40 Stat. 506 ..... 5, 6, 7, 8, 9, 10, 11
Rev. Stat. § 5202 (1878) 2, 3, 4, 5, 6, 7, 8, 11
12 U.S.C. 92 (1926) 11
12 U.S.C. 92 (1928) 11
12 U.S.C. 92 (1934) 11
12 U.S.C. 92 (1940) 11
12 U.S.C. 92 (1946) 11
12 U.S.C. 92 ..... 2, 3, 4, 6, 7, 8, 9, 10, 11, 12
12 C.F.R. Pt. 2 (1939) 11
12 C.F.R. 7.7100 (1992) 11

Miscellaneous:

2 *Annual Report of the Comptroller of the Currency* (Dec. 2, 1918), H.R. Doc. No. 1453, 65th Cong., 3d Sess. (1919) 10

Miscellaneous—Continued:	Page
53 Cong. Rec. (1916):	
p. 11,001	10, 11
p. 11,153	9
Letter to Senator Robert L. Owen (May 11, 1916), *reprinted in* S. Rep. No. 481, 64th Cong., 1st Sess. (1916)	10
S. Doc. No. 412, 64th Cong., 1st Sess. (1917)	7
S. Doc. No. 216, 66th Cong., 2d Sess. (1920)	11

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1. Respondents primarily argue that this Court must give controlling significance to the quotation marks that appeared on the "enrolled bill" in 1916, see *Field* v. *Clark*, 143 U.S. 649 (1892), even if that

would lead to a result Congress did not intend. Thus, respondents argue that "if the repeal of Section 92 was 'inadvertent,' it is of no significance." Br. 13. But cf. *Conroy* v. *Aniskoff*, No. 91-1353 (Mar. 31, 1993), slip op. 7 n.12.

But the quotation marks do not resolve the question presented; they merely raise an issue as to where Section 92 was to be placed. That is, while the quotation marks suggest that Section 92 was to be placed in Rev. Stat. § 5202, the text and structure of the 1916 Act show that Section 92 was placed in Section 13 of the Federal Reserve Act. As we have explained, the text and structure of the 1916 Act should control over the punctuation, particularly since Congress actually intended to delete the quotation marks. See Gov't Br. 21.

The key provision showing that Section 92 was placed in Section 13 of the Federal Reserve Act is the paragraph that preceded Section 92 in the 1916 enactment. That preceding paragraph—which granted the Federal Reserve Board authority to regulate certain practices of federal reserve banks—had been enacted as part of Section 13 of the Federal Reserve Act in 1913, as respondents' lodging plainly shows. Resp. Lodging 13-14. Both in 1913 and as amended in 1916, that preceding paragraph referred to "this Act," by which it plainly meant the Federal Reserve Act, as respondents concede. Br. 27. In our view, the reference to "this Act" shows that the paragraph preceding Section 92 remained part of Section 13 of the Federal Reserve Act in 1916. Respondents contend, however, that in 1916 Congress accidentally moved the paragraph that preceded Section 92 from Section 13 of the Federal Reserve Act to Rev. Stat. § 5202. This Court may overlook the

reference to "this Act," respondents further contend, on account of the happy coincidence that Rev. Stat. § 5202 refers to the "Federal reserve Act." That is, respondents argue that after 1916 "this Act" may be viewed as an antecedent reference to "Federal reserve Act" in Rev. Stat. § 5202.

That "antecedent reference" argument is unpersuasive. The reference to "this Act" in the paragraph preceding Section 92 is more naturally read as referring to the Act in which the provision is contained—*i.e.*, the Federal Reserve Act—both before and after 1916. That is how Congress used the phrase "this Act" in two other places in the 1916 amendments to the Federal Reserve Act. 92-507 Pet. App. 83a (paragraph beginning "'(m)"), 84a (first full paragraph). Moreover, using "this Act" in Rev. Stat. § 5202 to refer to the Federal Reserve Act would be confusing—a reader would normally suppose that a reference to "this Act" in Rev. Stat. § 5202 would be a reference to Rev. Stat. § 5202, not to the Federal Reserve Act. At a minimum, there would be ambiguity that could have been eliminated simply by referring to the Federal Reserve Act by its full name—had Congress intended to transfer the paragraph preceding Section 92 from the Federal Reserve Act to Rev. Stat. § 5202.

Moreover, the structure of the banking laws shows that Congress did not intend to move the paragraph preceding Section 92 to Rev. Stat. § 5202. That preceding paragraph belonged in the Federal Reserve Act because it granted the Federal Reserve Board authority to regulate certain discounting and rediscounting practices of federal reserve banks. Respondents argue (Br. 29-31) that it would not have

been unreasonable for Congress to have placed Section 92 in the Revised Statutes (although Rev. Stat. § 5202 had been limited for more than fifty years to matters involving the indebtedness of national banks), but they do not even suggest that it would have been plausible for Congress to have intended to transfer the paragraph preceding Section 92 to the Revised Statutes. And if that preceding paragraph remained in the Federal Reserve Act after 1916, so did Section 92.[1]

Respondents protest that to conclude that Section 92 was not enacted as part of Rev. Stat. § 5202 would render "meaningless" the language in the 1916 Act stating that Rev. Stat. § 5202 was being "amended so as to read as follows." Br. 25-26. But as we explain in our opening brief (at 19 n.5), the paragraph regarding Rev. Stat. § 5202, including the language stating that Rev. Stat. § 5202 was "amended so as to read as follows," was carried over from the 1913 Act as part of a comprehensive restatement of Section 13 of the Federal Reserve Act, which was reprinted in its entirety in 1916. In other words, the clause on which respondents rely was merely a leftover, like many other clauses in Section 13 that appeared in the 1913 Act and were included

[1] Because the text and structure of the 1916 Act conflict with the quotation marks, *In re Schilling*, 53 F. 81 (2d Cir. 1892), upon which respondents rely (see Resp. Br. 23-24), presents a different situation. *Schilling* involved a case in which the inference to be drawn from assertedly misplaced parentheses was not rebutted by anything in the text of the statute. In this case, by contrast, there is conflicting evidence on the face of the 1916 Act which bears directly on the proper placement of Section 92.

without change in the 1916 Act. Compare 92-507 Pet. App. 80a-82a with *id.* at 83a-88a.[2]

The title of the 1916 Act—"An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen"—supports the conclusion that Rev. Stat. § 5202 was not amended in 1916, since Rev. Stat. § 5202 is not mentioned in the title. As we illustrate in our opening brief (at 18), the practice at that time was that when Congress titled a provision by listing the Acts that were being amended, it listed *all* of the Acts that were being amended. Respondents point (Br. 29) to two statutes from that era that did not list the Acts that were being amended. Those two statutes differ from the 1916 Act, however, because they did not list any of the Acts that were being amended, but instead contained purely descriptive titles.[3] That does not rebut

[2] Respondents note (Br. 26) that in *Posadas* v. *National City Bank*, 296 U.S. 497, 502 (1936), a case involving Section 25 of the Federal Reserve Act, this Court stated in passing that "[t]he act of September 7, 1916, amends §§ 11, 13, subsection (e) of § 14, the second paragraph of § 16, §§ 24 and 25, and § 5202 of the Revised Statutes." That statement is not a holding that Rev. Stat. § 5202 was amended in 1916. It merely shows that, in the absence of an examination of the 1913 Act, a reader of the 1916 Act might not realize that the paragraph involving Rev. Stat. § 5202 was simply carried over as part of the restatement of Section 13 of the Federal Reserve Act.

[3] See Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 ("An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."); War Finance Corporation Act of 1918, ch. 45, 40

the conclusion that when Congress did not provide a descriptive title, but instead listed the Acts that were being amended, it gave a comprehensive list of the Acts that were being amended.

2. Unlike the court of appeals, respondents do not emphasize the 1918 Act. The D.C. Circuit stated: "Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand. What we are called upon to determine are the consequences of the action taken by the 65th Congress when, two years later, it voted the 1918 Act into law." 92-507 Pet. App. 12a. The court of appeals then stated that in 1918 "there were only three sources to which [Congress] could turn for up-to-date information: the Statutes at Large * * * or either of two privately published services." *Id.* at 13a. Both of those privately published services placed Section 92 in Rev. Stat. § 5202, and the court's premise that the drafters would have consulted one of those services or the Statutes at Large formed the basis for the court's holding "that the 65th Congress understood section 92 to be part of section 5202, and that its exclusion from the amended section 5202 signaled its repeal." *Ibid.*

As we explain in our opening brief, the court of appeals' premise was flawed. There were not "only three sources" (Pet. App. 13a) to which Congress could have turned in 1918. There was a fourth—a compilation of the federal banking laws that had been

Stat. 506 ("An Act To provide further for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes.").

prepared by the Comptroller of the Currency and published by the Senate in 1917. S. Doc. No. 412, 64th Cong., 1st Sess. (1917). That compilation, which respondents have reprinted in part in the lodging they have filed, shows Section 92 twice—as part of Section 13 of the Federal Reserve Act and as part of Rev. Stat. § 5202. Resp. Lodging 50 (Rev. Stat. § 5202), 52 (Section 13). At the least, the Comptroller's compilation shows that the 1916 Act was ambiguous with respect to the placement of Section 92. Moreover, in light of its dual appearance in the federal banking laws, the drafters of the 1918 Act would have assumed that Section 92 would continue in force as part of Section 13 of the Federal Reserve Act however Rev. Stat. § 5202 was amended. They might even have thought that deleting Section 92 from Rev. Stat. § 5202 while retaining it in Section 13 of the Federal Reserve Act would remove an unnecessary redundancy from the federal banking laws.

In light of the court of appeals' flawed premise, respondents' argument does not track the opinion of the D.C. Circuit. But respondents defend the court of appeals' result by stating that it is "unclear" whether the drafters of the 1918 Act would have turned to the Comptroller's 1917 compilation of the federal banking laws that was published by the Senate. Br. 36. Of course, we cannot prove what the drafters used. But it is hard to see why Congress would have published a compilation of the federal banking laws in 1917, and then ignored it in 1918 in order to consult privately published compilations.[4]

[4] Respondents also state that the "Comptroller compilation" is "like the two privately published services to which the court of appeals referred." Br. 36. As respondents' lodg-

Respondents also suggest that "if Congress had relied on the Comptroller compilation * * *[,] Congress would have been impelled to amend both Section 5202 *and* the Federal Reserve Act in 1918." Br. 36 n.39. That is not so. By amending Rev. Stat. § 5202 in 1918, Congress accomplished its goal of adding a sixth provision to Rev. Stat. § 5202 that authorized national banks to assume "[l]iabilities incurred under the provisions of the War Finance Corporation Act." 92-507 Pet. App. 94a. A reader of Section 13 of the Federal Reserve Act would also have seen a reference to Rev. Stat. § 5202 showing that Congress previously had added a fifth provision authorizing national banks to assume "[l]iabilities incurred under the provisions of the Federal Reserve Act." 92-507 Pet. App. 82a. But contrary to respondents' contention, Congress would not have felt "impelled" in 1918, as part of the War Finance Corporation Act, to amend Section 13 of the Federal Reserve Act to add the sixth proviso there as well. That would have been unnecessary because a reader of Section 13 of the Federal Reserve Act would have consulted Rev. Stat. § 5202 to be sure that he had the up-to-date version of that Act.

Thus, focusing on 1918 provides no basis for the conclusion that Congress intended to repeal Section 92. To the contrary, respondents have failed to supply any reason why Congress would have wanted to repeal Section 92 in the course of passing the 1918

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ing shows, however, the two private compilations differ from the Comptroller's on the key point at issue here—the private compilations reprint Section 92 only once and they place it in Rev. Stat. § 5202, not in Section 13 of the Federal Reserve Act. Resp. Lodging 41-42 (Mallory compilation), 45-46 (Barnett compilation).

War Finance Corporation Act. See generally Gov't Br. 25-27. Yet where "the compromise or abandonment of previously articulated policies" is involved, one "would normally expect some expression by Congress that such results are intended." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). In this case, there is no indication in the legislative history of the 1918 Act that Congress thought it was repealing Section 92. Particularly given that Senator Owen, Section 92's sponsor, remained the Chairman of the Senate Banking Committee and was a major participant in the debates over passage of the 1918 Act, and that Comptroller Williams, who originally proposed Section 92, remained the Comptroller of the Currency (see Gov't Br. 24-25), this is a case where silence is "most eloquent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). See *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1544 (1991).

Respondents suggest that there was no need for Congress in 1918 to explain the deletion of national bank insurance agency authority because, they contend, Senator Owen said he was not concerned "one way or the other" with such authority. Br. 33 n.33. But Senator Owen's statement that "[t]he matter is unimportant either way" (53 Cong. Rec. 11,153 (1916)) was made in the course of remarking that he was willing to amend Section 92 as proposed to include towns of up to 5,000 (rather than 3,000) inhabitants. Quite plainly, Senator Owen was referring to where to draw the line among various small towns as to Section 92's application, and was not suggesting that the national bank insurance agency

authority was itself unimportant. To the contrary, in proposing that authority, Comptroller Williams emphasized that it dealt with a problem which he had been considering "[f]or some time." 53 Cong. Rec. 11,001 (1916). Moreover, the Comptroller reported to Congress in 1918 that banks in 41 States and Hawaii had exercised the authority granted by Section 92. 2 *Annual Report of the Comptroller of the Currency* (Dec. 2, 1918), H.R. Doc. No. 1453, 65th Cong., 3d Sess. 234-237 (1919). Thus, Congress was aware that a large number of banks had relied on Section 92, which shows that it was not an unimportant provision and makes it all the more implausible to suggest that Congress would have repealed Section 92 without comment.

Moreover, respondents do not suggest that the authorities granted by the paragraphs on either side of Section 92—and which were, in their view, also repealed in 1918—were insubstantial. To the contrary, in proposing the provision that followed Section 92 in the 1916 Act, Federal Reserve Board member Paul M. Warburg predicted that it "would prove a great help for our American banks." Letter to Senator Robert L. Owen (May 11, 1916), *reprinted in* S. Rep. No. 481, 64th Cong., 1st Sess. 10 (1916).

3. Respondents also contend (Br. 34) that the Comptroller's construction of the 1916 and 1918 Acts is not entitled to deference because "no agency expertise comes into play in judging whether Congress did or did not repeal a statutory provision." But the Comptroller was "charged with the responsibility of setting [Section 92's] machinery in motion," and where Section 92 was located (and whether it was repealed) is plainly a matter that the Comptroller

had to decide in "making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Moreover, the contemporaneous administrative construction carries the most weight where it was the administrator who "suggested the provisions' enactment to Congress" (*United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940)), and it was the Comptroller who proposed the enactment of Section 92 (see 53 Cong. Rec. 11,001 (1916)). Contrary to respondents' claim (Br. 35) that the Comptroller thought that Section 92 had been added to Rev. Stat. § 5202, the Comptroller located that provision in both Rev. Stat. § 5202 and Section 13 of the Federal Reserve Act following the enactment of the 1916 Act (see Resp. Lodging 50, 52), and in Section 13 of the Federal Reserve Act following the enactment of the 1918 Act (see S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920)). In addition, the Comptroller has adhered continuously to the view that Section 92 remains in effect. See 12 C.F.R. 7.7100 (1992); 12 C.F.R. Pt. 2 (1939).

Respondents also suggest (Br. 34 n.35) that if any view warrants deference, it is the view of the Office of the Law Revision Counsel, which assembles the United States Code. But the presumption arising from the codifiers' deletion of Section 92 from the U.S. Code in 1952 is undercut by the codifiers' decision to include Section 92 in the 1926, 1928, 1934, 1940, and 1946 editions of the U.S. Code. In other words, the contemporaneous view that Section 92 was not repealed in 1918 was unanimous.

4. A court may find itself bound to conclude that Congress repealed a provision of law, even though

there are indications to the contrary. But there is no reason to embrace the conclusion that Congress inadvertently repealed a statute where it is unnecessary —and, indeed, inappropriate—to do so. That is particularly so when, as here, the consequence would be the elimination of a provision relied upon by government regulators and private industry for more than three-quarters of a century. In this case, there are sound reasons to resist the conclusion that the quotation marks that appeared on the 1916 Act ultimately caused Section 92 to be repealed. As we show in our opening brief (at 21) the Senate actually voted to remove the quotation marks from the 1916 Act altogether, and respondents do not explain how they nevertheless were reinserted in the bill; what is clear, however, is that the quotation marks were not intended to have interpretive significance. On the other hand, the language and structure of the 1916 Act were intended to have meaning. Reasonably read, the text of the 1916 Act, along with the evidence from 1918, shows that Congress did not repeal Section 92, accidentally or otherwise.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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